Censorware Exemption Reply Comment

Name of the commenter: Seth Finkelstein

Comment number(s) of comment(s) to which you are responding

Comment 2, by Jonathan Band, Library Copyright Alliance and Music Library Association.

Proposed Class To Which The Reply Is Responsive

> "Compilations consisting of lists of Internet locations blocked by commercially marketed filtering software applications that are intended to prevent access to domains, websites or portions of websites, but not including lists of Internet locations blocked by software applications that operate exclusively to protect against damage to a computer or a computer network or lists of Internet locations blocked by software applications that operate exclusively to prevent receipt of email."

Summary of the argument

Censorware blacklists remain a matter of public concern. In the past few years, they have figured prominently in foreign government's censorship of their citizens, particularly Iran, Saudi Arabia, and China. And in the United States, censorware is still a major factor in such legal debates as an ongoing challenge to the Child Online Protection Act (COPA), and the aftermath of the court decision upholding linking of certain library funding to library use of censorware, The Children's Internet Protection Act (CIPA). Investigation of such blacklists remains a socially beneficial fair use, and does not constitute any recognized harm to the copyright interests of censorware companies.

Facts And/Or Legal Argument

I would like to commend the Register for the excellent decision in the 2003 recommendation [Register, 2003]:

> The Register's recommendation in favor of this exemption is based primarily on the evidence introduced in the comments and testimony by one person, Seth Finkelstein, a non−lawyer participating on his own behalf. In addition to identifying a class of works that related to the specific facts presented, he identified the qualitative nature of the noninfringing uses for which circumvention was necessary and generally identified the technological measure which controlled access to this class. There was no dispute that the lists of Internet locations blocked by filtering software are generally encrypted or otherwise protected by an access control measure. The remedy sought was causally related to the noninfringing uses that are necessary to conduct research, comment and criticism on the filtering software at issue. Mr. Finkelstein also anticipated objections to the exemption and proved that available alternatives to the exemption were insufficient to remedy the adverse effect caused by the prohibition. The insufficiency of alternatives was supported by testimony and demonstrative evidence at the hearing in California by James Tyre. Finally, Mr. Finkelstein's succinct initial comment addressed the statutory requirements and thoughtfully analyzed each of the statutory factors required to be considered in this rulemaking.

Having presented such an analysis in the previous round, hopefully there is no need to burden everyone involved by representing it anew. Nothing has changed in the past three years in terms of the relevant law concerning infringement or fair use, or the technological protection measure of encryption of blacklists.

I am mindful of the standards [Federal Register, 2005]:

> Exemptions are reviewed de novo and prior exemptions will expire unless sufficient new evidence is presented in each rulemaking that the prohibition has or is likely to have an adverse effect on noninfringing uses. The facts and argument that supported an exemption during any given 3−year period may be insufficient within the context of the marketplace in a different 3−year period.

And further [Register, 2003]:

> At the outset, the Register disagrees with the commenters who suggested that an exemption can be "renewed" if the opponents of an exemption do not prove that adverse effects identified in a previous rulemaking have not been cured. The burden of proof for an exemption rests with its proponents, and the fact that an exemption was granted in the previous rulemaking creates no presumptions. The exemptions in each rulemaking are considered de novo. [...] Congress anticipated that market conditions would be constantly changing and that the market would be viewed anew in each triennial proceeding.

However, I am not asserting a ***presumption***. Rather, as part of a reply of facts and arguments supporting the current proposal, I attempt to re−incorporate by reference the facts and arguments which have been developed previously, and will of course have to be used in the current determination. That is, the material which I presented as direct facts and arguments previously for myself, now becomes supporting facts and arguments for Jonathan Band's proposal.

Additionally, there's ongoing interest in the contents of censorware blacklists. The topic has recently become prominent regarding legal arguments concerning an ongoing challenge to the Child Online Protection Act (COPA) in the United States. Elsewhere, the "Open Net Initiative" (http://www.opennetinitiative.net) has issued several reports on censorware as used by various oppressive countries, notably Iran, Saudi Arabia, and China. As far I know, they don't do decryption, and I wish I could help them by decrypting blacklists.

Sadly, I can do little more nowadays. I have been driven to abandon censorware decryption research.

I'd also like to note some severe Unintended Consequences to the process of reviewing the exemptions, where I have a unique perspective to contribute. The exemption process is supposed to be a "fail−safe" mechanism, part of preserving fair use. There's been much discussion about flaws in the process, and though this is hardly the place to examine it over, I'd like to give some unique factual analysis.

A little background is necessary. Some of this is very unpleasant, but there's no easy way (or at least, it's beyond my diplomatic abilities).

When I first set out to decrypt censorware blacklists, in 1995, I faced enormous opposition, even from civil−libertarians, due to complicated politics about censorware. In fact, the first lawyer I contacted seeking help with my then−secret work, Mike Godwin, well, I'll let James Tyre describe it, from a message detailing my work [Tyre, 2000]

> Why has Seth been so secretive? He can explain better than I, but in a nutshell, think about how he's been flamed by Brock and Declan over the years, *despite* what they knew. And yes,

> think even more about how brutal Godwin has been on Seth, and then know that Godwin has known this little secret from day one, and he has known it from within the framework of an attorney−client relation which he briefly had with Seth.

Or a public mailing posting from Case Western Reserve University Law School professor Peter Junger [Junger, 2001]

> I may, however, be influenced by the fact that you in the past viciously attacked Seth for the work, including his articles on this list and elsewhere, that won him the prize and led to the article in the Times. I am glad that the Times profile did not go into more detail about the obstacles that Seth had to overcome. You have much more reason to be glad about that.

Now, with that background, let me review some of what happened in the 2003 rulemaking. I participated at my own expense (very important given the lengthy unemployment I'd experienced during the tech−wreck at the time). And I think it's fair to say that the testimony of the censorware companies' representative, David Burt, did not go well.

> MR. BAND: I also, not to belabor the point, but this is a little bit like the Iraqi Information Minister saying, "No, there are no American troops in Baghdad," when, you know, the American troops were right there. You keep on saying, "No, no circumvention has occurred," when right next to you there's a guy who has said a dozen times, "I circumvented it and this is what I did." I am a little surprised. That's all I can say. (Laughter.)

After this, David Burt took the opportunity to use a post−hearing reply to reference many personal attacks on me. I found that deeply upsetting, given the overall stress of the process, and that I was experiencing those same attacks constantly elsewhere. In my view, I'd played by the rules, he was playing foul, and there was nothing that could be done about it. And it just got worse.

One ready argument is such conduct doesn't matter, and good people will see through the noise. But that's not obvious when one is in the middle of it all, and hence there's still a very negative effect.

I'll be a little vague the next paragraph to respect someone's desire not to be further involved. At the time, I had been involved in a semi−private discussion with several lawyers about certain approaches to censorware issues. One of these lawyers was being mentioned in the attacks on me. In view of what I saw as the raised stakes, I wrote him asking him to denounce them. He took offense, threatened something to humiliate me (he later backed down, hence my circumspection here), and then wrote a message not exactly supportive, to me, the maintainer of the attacks, and Mike Godwin. Even though I clearly noted the connection to the DMCA Exemption process, Mike Godwin responded by re−iterating his support of the attacks on me.

Let me stop here, and note with special emphasis: During a process aimed at preserving one of the few existing DMCA exemptions, a well−known civil−liberties lawyer actually gave his support of attacks on me as they were being used by the censorware companies' representative to try oppose that DMCA exemption. This might sound incredible, but it's one reason I've noted the public quotes above.

That incident was a turning−point for me. Not to be too melodramatic about it, as there were many other factors involved, but it was a point where something simply broke for me in terms of what I could volunteer. I don't want to go through anything similar ever again. It's just not worth it.

As a postscript to the above story, and to prove just how legally serious this can be, a year later Mike Godwin managed to get the very same attacks, and more, inserted into an interview I had done. Which led to the following message sent by Peter Junger to a Harvard administrator [Junger, 2004]

> I am one of those to whom Seth Finkelstein sent a copy of his "Formal Request To Restore Interview To Agreed−Upon Form" addressed to the editors of greplaw. I presume that he copied me both because we share an interest in free speech and computing and because in times past I have felt obliged to try to deflect some of the public attacks made against him by Mike Godwin, who is−−as I suspect you are only too well aware−−rather a bully.
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> ...
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> It would be interesting to see what would happen if Seth should now threaten to sue the Berkman Center and Harvard for defamation. − −−So interesting that I would be willing to donate a thousand dollars towards the legal expenses of such a suit and spend some time working on the briefs and pleadings.

Now, having gone through all this set−up, here is the key problem:

> What would stop censorware companies from making all future proceedings into a personal attack? They'll lose on the exemption???

There is something *deeply wrong* with a process which has an effect of setting up someone to be a personal target, with no practical defense. Then it becomes not a failsafe, but a gauntlet.

That is, once the censorware companies lose a rulemaking proceeding, they get three years to figure out how they can smear the proponent the next time around. I don't have the sort of reputational protection (e.g. being a professor or having a prestigious fellowship) to want to risk playing that game. To quote in full a literary expression on the topic (Charles Dickens, Oliver Twist, chapter 51, p. 489 (1970))

> "If the law supposes that," said Mr. Bumble, ... "the law is a ass −− a idiot. If that's the eye of the law, the law is a bachelor; and the worst I wish the law is that his eye may be opened by experience −− by experience."

It might be said "If you can't stand the heat, get out of the kitchen". But I'd rebut that it's a deeply flawed process that requires someone to *repeatedly* stick his head in an oven. And there is value documenting that the environment is stifling, cuts off fresh air, and could use some reconstruction.

I realize I'll probably catch some flack for what I've said. But I'm not the main exemption proponent now, nobody is relying on me, and I've made it clear I won't carry the burden of defending the exemption this time around. There's an easy accusation that I'm just making personal attacks myself. I'd reply that having done such an enormous amount of uncompensated censorware decryption work, the many reasons I felt forced to abandon it, merit some respect, and are of value to the issues of the DMCA versus fair use.

In conclusion, let me state that I understand the argument of *illegitimis non carborundum*. But preserving fair use should not require one to be unfairly used.

Sincerely,

Seth Finkelstein

References

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